the motion, the trial court's Order can be reversed for failing to issue a "definitive ruling."

Monroe does not state that a trial judge who denies a motion for directed verdict in a criminal trial must explicitly rule that the evidence is sufficient as a matter of law to support a conviction. Such a ruling is implicit in denial of a motion for directed verdict.

A motion for directed verdict is properly granted when there is insufficient evidence to authorize a rational trier of fact to find criminal defendant guilty of the crime for which they are charged beyond a reasonable doubt. *Jordon v. State*, 272 Ga. 395, 396, 530 S.E.2d 192, 194 (2000). Further, the *Monroe* rule has also been stated as follows:

> one of the essential elements of an action for malicious prosecution, the lack of probable cause . . . cannot be established as a matter of law if in the preceding criminal action the court denied the claimant's motion for directed verdict of acquittal and that ruling stands unreversed and untainted by fraud or corruption.

Wingster v. Huntley's Jiffy Stores Inc., 200 Ga. App. 252, 252, 407 S.E.2d 481, 482 (1991) (citations omitted).

Accordingly, it is clear that no decision issued by any Georgia court has required that any Judge use specific language in its order denying a motion for directed verdict. The court is only required to clearly express its denial, not the reasons underlying said denial. *Id.*; *Monroe*, *supra*.

Next, Petitioner argues that the trial judge's statements *when he denied the motion for directed verdict* "appear to acknowledge the reasonable doubt left by the evidence presented by the state" since Judge Flournoy complimented Petitioner's ability as an advocate for Ms.

Titelman. (Brief for Petitioner, p. 7)[1] This argument is legally and factually without merit. Legally speaking,

> [a] *trial court* cannot choose to deny a meritorious motion for a directed verdict of acquittal made at the close of the State's case. "[I]t constitutes reversible error for the trial court to refuse to direct a verdict of acquittal where there is absolutely no conflict in the evidence and the verdict of acquittal is demanded as a matter of law."

Griffin v. Georgia Power Co., 186 Ga. App. 565, 566, 367 S.E.2d 832, 833-34 (1988) (citations omitted) (emphasis in original).

Judge Flournoy, although complimentary of Petitioner, nevertheless refused to direct a verdict to Ms. Titelman since there was, in his opinion, a conflict in the evidence such that a verdict for acquittal was not demanded as a matter of law. The trial court therefore denied two motions for directed verdict that Petitioner filed on behalf of Ms. Titelman. It is immaterial that the trial judge was complimentary of the skill with which a losing argument was presented so long as the denial of the Motions were not alleged to have been procured by fraud or corruption.

B. Petitioner Fails to Show that His Argument that *Monroe* Was Distinguishable Was Based on Reason and in Good Faith.

Petitioner's claim that his arguments to distinguish *Monroe* constituted good faith attempts to extend, modify, or reverse current case law also lack merit.

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[1] Actually Judge Flournoy was complimentary of the skill of both Petitioner and the State's attorney. (Brief for Petitioner, p. 6)

1. The District Court was an inappropriate venue to argue the reversal or modification of *Monroe*

In *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938), this Court held that when federal courts exercise diversity jurisdiction, "the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern." *Erie*, 304 U.S. at 78, 58 S. Ct. at 822, 82 L. Ed. at 1194. A few years later, this Court again stated that

> the highest court of the state is the final arbiter of what is state law. When it has spoken, its pronouncement is to be accepted by federal courts as defining state law unless it has later given clear and persuasive indication that its pronouncement will be modified, limited or restricted.

West v. American Telephone & Telegraph Co., 311 U.S. 223, 236, 61 S. Ct. 179, 183, 85 L. Ed. 139, 144 (1940).

Erie and *West* have been the law of the land for more than six decades. If Petitioner wished that a court overrule *Monroe* to suit his needs, it was incumbent upon him to seek relief in Georgia's Supreme Court, not in the federal court system.

Monroe is a decision of Georgia's highest court and, as shown below, there are no signs which indicate that the Supreme Court of Georgia is considering modifying, changing, limiting or overruling that decision. Petitioner inappropriately chose federal court as a forum both to argue Ms. Titelman's claims for custody and in his effort to controvert the findings of probable cause although he

knew that no evidence existed to allege that Judge Flournoy's Orders were procured by fraud or corruption. Furthermore, there are no decisions by any Georgia state court which question, decline to follow, or limit *Monroe*'s holding that a denial of a directed verdict of acquittal at the criminal trial precludes a claim for malicious prosecution as a matter of law, absent evidence of fraud or corruption.

2. No exception to *Monroe* applies to Ms. Titelman's claim

Petitioner does not show that any exception to *Monroe*'s rule is factually analogous to Ms. Titelman's case and does not show that any Georgia court would failed to apply *Monroe* to the facts herein.

Petitioner cites to the dissent of *Griffin*, *supra*. However, a federal court exercising diversity jurisdiction cannot follow the logic of a dissent contained in Georgia Court of Appeals' opinions. Rather, it is constrained to follow the law as pronounced by the Georgia Supreme Court, i.e., *Monroe*. *See generally*, *Erie R.R.*, *supra*. Secondly, in *Griffin*, the plaintiff during the underlying criminal trial had made two motions for directed verdict. The first was denied, but the second was granted. *See*, *Griffin*, 186 Ga. App. at 565, 367 S.E.2d at 833. The majority decided to follow *Monroe*, which prompted the dissent to question whether *Monroe* should be followed *when the trial court granted a subsequent motion for directed verdict*. Moreover, the dissent only questions the application of *Monroe* when a subsequent motion for directed verdict has been granted; it does not question the validity of *Monroe*. *See*, *Griffin*, 186 Ga. App. at 567, 367

S.E.2d at 834 (*stating*, "I believe the majority's decision extends the holding in *Monroe v. Sigler* well beyond its intended parameters."). Petitioner's citation to this case is misleading and does not further his argument. *Griffin* is clearly distinguished on its procedural facts.

Petitioner next cites to the dissent of *Seven Hills Security, Inc. v. Dillingham*, 188 Ga. App. 1, 372 S.E.2d 1 (1988) as evidence that *Monroe* was again being attacked. *Seven Hills* presents the same factual underpinning as *Griffin*. The portion of the dissent which Petitioner quotes is not questioning the validity of *Monroe*, but rather the validity of *Griffin*, and how it may lead to a person escaping civil liability. *See*, *Seven Hills*, 188 Ga. App. at 2-3, 372 S.E.2d at 2 (*stating*, "This court cannot avoid the application of *Monroe v. Sigler* where only one motion for directed verdict is made and denied, but we need not unnecessarily extend it to situations where two motions for directed verdict of acquittal are made, with the first motion being denied and the second being granted.") Once again, this dissent does not question the validity of *Monroe* in situations such as the one at hand. Moreover, this dissent actually reinforces the continued applicability of *Monroe* to cases such as the one at hand.

Nor does *Atlantic Zayre, Inc. v. Meeks*, 194 Ga. App. 267, 390 S.E.2d 398 (1990) show that "*Monroe* is not the impenetrable fortress" which the lower courts held it to be, as Petitioner argues in his Brief. (Brief for Petitioner, p. 15) *Atlantic Zayre* and Ms. Titelman's claims are obviously distinguishable. The court in *Atlantic Zayre* was dealing with a juvenile case, not a criminal case. The court noted this difference, stating,

> [m]oreover, because the juvenile proceeding is totally other than and distinct from a criminal proceeding, . . . there is a real question as to whether the denial of a directed verdict for acquittal in a juvenile case, as distinguished from a criminal case, can be held to fall under the rubric of *Monroe v. Sigler*.

Atlantic Zayre, 194 Ga. App. at 269, 390 S.E.2d at 400.

Further, Petitioner both misreads and misunderstands the scenario presented in *Haile v. Pittman*, 194 Ga. App. 105, 389 S.E.2d 564 (1989). In *Haile*, the trial judge, hearing the case without a jury, denied the defendant's motion for a judgment of acquittal. Petitioner contends before this Court that the dissenters disagreed with

> the majority's application of *Monroe* because, as [Wendy Titelman argued in the underlying case,] the denial of the motion for directed acquittal was not premised on a specific finding that the state had at that time presented sufficient evidence of guilt to convict, as the trial judge expressed some uncertainty about the case.

Brief for Petitioner, p. 15.

However, Petitioner ignores the difference between the case at bar with the facts presented in *Haile*. In *Haile*, the majority applied *Monroe* to a situation where a judge, hearing a case **without a jury**, denied a criminal defendant's motion "for a judgment of acquittal." *Haile*, 194 Ga. App. at 105, 389 S.E.2d at 565. In dissent, two judges doubted whether *Monroe* should apply in the matter. Because there was no jury, **"there was no proper motion for directed verdict**, as the law does not provide for such in a bench trial because a verdict is the decision of a jury." *Haile*, 194 Ga. App. at 108, 389 S.E.2d at 567 (emphasis

added). Essentially, the dissenting judges question the applicability of *Monroe* to bench trials, but not the validity of *Monroe*. *Id.*

Petitioner next cites to *Wolf Camera, Inc. v. Royter*, 253 Ga. App. 254, 558 S.E.2d 797 (2002) for the proposition that should a civil plaintiff be able to show that the criminal prosecution was obtained through fraud, that *Monroe* is inapplicable. (Brief for Petitioner, p. 16) *Wolf Camera* merely reaffirms the *Monroe* exception to the finding of probable cause through a showing of fraud or corruption. *See*, *Monroe*, 256 Ga. at 761, 353 S.E.2d at 25. The *Wolf Camera* decision is an *application* of *Monroe*, not a *repudiation* of it, as Petitioner would argue. Further, in *Wolf Camera*, the civil plaintiff presented evidence of fraud which directly lead to the criminal charges. *Wolf Camera*, 253 Ga. App. at 258, 558 S.E.2d at 801. In this case, no evidence of fraud or corruption was even pled, much less presented, by Petitioner, which is the primary reason that sanctions were imposed. Rather than support Petitioner's contentions, *Wolf Camera* is yet another example of Georgia's faithful application of *Monroe*.

A similar finding is made in *Kelly v. Serna*, 87 F.3d 1235 (11th Cir. 2002), which Petitioner cites to for the proposition that a convicted plaintiff may recover for malicious prosecution upon a showing of fraud. (Brief for Petitioner, p. 16) This is a correct statement. However, the *Kelly* court cites to *Monroe* for that proposition. *See*, *Kelly*, 87 F.3d at 1241 (*stating*, "A jury conviction is conclusive of probable cause unless there was fraud. *Monroe*, 353 S.E.2d at 25").

Petitioner concludes by citing to *Blackford v. Wal-Mart Stores*, 17 F.3d 367 (11th Cir. 1994) for the proposition that

the law of probable cause in a malicious prosecution case is 'unsettled.' (Brief for Petitioner, p. 17) Petitioner's characterization of *Blackford* is misleading. In *Blackford*, the Eleventh Circuit Court of Appeals certified the following question to the Georgia Supreme Court: "In a suit alleging malicious prosecution of a criminal bad check charge that was dismissed by the court without trial, is evidence admissible that tends to prove plaintiff's guilt in fact of the offense and, if so proved, is guilt a bar to the malicious prosecution suit?" *Blackford*, 17 F.3d at 368. The question was certified because Georgia law *on this particular question* was unsettled, not Georgia law in general as to probable cause. *Id.* Further, the issue presented in *Blackford* is not presented by the facts *sub judice*.

After even a cursory reading of the seven cases cited by Petitioner, one is left with the inevitable conclusion that when a trial judge denies a properly heard motion for directed verdict in a case pending in a jurisdiction other than juvenile court, probable cause has been established as a matter of law absent a showing of fraud or corruption. *See, Monroe, supra; Griffin, supra; Seven Hills, supra; Atlantic Zayre, supra; Haile, supra; Wolf Camera, supra; Kelly, supra; Blackford, supra.* Petitioner knew *Monroe* and its progeny would apply, but took no steps to avoid its application. Thus, the Order granting Respondents' Rule 11 sanctions should be affirmed.

II. RULE 11 SANCTIONS

A. Text and Purpose of Rule 11

In pertinent part, Rule 11 of the Federal Rules of Civil Procedure states:

(a) **Signature.** Every pleading . . . shall be signed by at least one attorney of record in the attorney's individual name . . .

(b) **Representation to Court.** By presenting to the court . . . a pleading . . . an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, for after an inquiry reasonable under the circumstances, –

(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

(c) **Sanctions.** If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions [set forth in the full text of the Rule], impose an appropriate sanction upon the attorneys, law firms, or parties

> that have violated subdivision (b) or are responsible for the violation.

Rule 11, FRCP.

A District Court may award sanctions (1) when a party files a pleading that has no reasonable factual basis; (2) when the party files a pleading that is based on a legal theory that has no reasonable chance of success and that cannot be advanced as a reasonable argument to change existing law; or (3) when the party files a pleading in bad faith for an improper purpose. *Massengale v. Ray*, 267 F.3d 1298, 1301 (11th Cir. 2001); *United States v. Milam*, 855 F.2d 739, 742 (11th Cir. 1988). In this case, the District Court granted sanctions based upon legal and factual insufficiency, as well as the fact that the litigation was initiated and maintained for the purpose of harassment. *See*, 17-A – 30-A, Petitioner's Appendix.

"The standard for testing conduct under amended Rule 11 is 'reasonableness under the circumstances.'" *Anderson v. Smithfield Foods, Inc.*, 353 F.3d 912, 915 (11th Cir. 2003). In the Eleventh Circuit, a court confronted with a motion for Rule 11 sanctions first determines whether the party's claims are objectively frivolous – in view of the facts or law – and then, if they are, whether the person who signed the pleadings should have been aware that they were frivolous; that is, whether he would have been aware had he made a reasonable inquiry. *Jones v. International Riding Helmets, Ltd.*, 49 F.3d 692, 695 (11th Cir. 1995). Finally, this Court reviews the District Court's grant of sanctions under Rule 11 using an abuse of discretion standard. *See, Cooter & Gell v. Hartmax Corp.*, 496 U.S. 384, 110 S. Ct. 2447, 110 L. Ed. 2d 359 (1990).

B. Legal and Factual Insufficiency

As noted above, *Monroe* requires that a civil litigator whose motion for directed verdict was denied at a preceding criminal trial show that the denial was the product of fraud or corruption in order to maintain a cause of action for malicious prosecution. *See, Monroe, supra.* Both the District Court and the Court of Appeals for the Eleventh Circuit found that Petitioner had failed to allege that the criminal trial judge's denial of Wendy Titelman's motions for directed verdict were procured through fraud or corruption, even after being given specific opportunity to do so. *See generally,* Appendix to Petition. Due to Petitioner's inability to make proper *factual* allegations (fraud or corruption), his client's *legal* claims also became deficient (*Monroe*).

Further, as shown above, Petitioner cannot show that *Monroe* should be modified or not applied under the situation at hand. By all available evidence, no Georgia court would fail to apply *Monroe* to the situation presented by this case. Further, to the extent that Petitioner was arguing for a modification, extension, or reversal of existing *state* law, such an argument is also without merit. As described above, federal court is a totally inappropriate venue in which to argue for this kind of change to state law, as a federal court is bound to apply the law as pronounced by Georgia's Supreme Court. *See, Erie R.R., supra*; *West, supra. Monroe* is such a pronouncement. There is no indication that, under the facts presented by this matter, that any Georgia court would fail to apply *Monroe* as both the District Court and Eleventh Circuit did.

Petitioner first argues that the Eleventh Circuit failed to address the question of whether his arguments to distinguish *Monroe* were reasonable and nonfrivolous. (Brief for Petitioner, pps. 10-12) This is patently false. The Eleventh Circuit's opinion affirmed the District Court's imposition of sanctions. The District Court found that Petitioner's arguments violated Rule 11, in part because it was legally and factually insufficient. Petitioner does not address the validity of the District Court's action. As shown above, Petitioner's arguments before the District Court regarding *Monroe* were clearly frivolous.

Secondly, Petitioner fails to show that the Eleventh Circuit's Order affirming the District Court's award of sanctions was in error. The Eleventh Circuit noted that *Monroe* had to control the District Court's view of Georgia law, as it represents the pronouncement of Georgia's highest court on a question of law specifically brought by this case. (58-A – 59-A, Petitioner's Appendix) The Eleventh Circuit relied upon *Three Palms Pointe, Inc. v. State Farm Fire & Cas. Co.*, 362 F.3d 1317, 1318 (11th Cir. 2004) for the proposition that a federal court in a diversity action **must** decide the case the way it appears the state's highest court would. *Id.*; *see also, Erie R.R., supra*; *West, supra.* As Georgia law does not recognize the exception, neither can a federal court exercising diversity jurisdiction in Georgia.

As shown herein, the District Court's action was clearly within the wide net of discretion given to it by the Rules and this Court's precedent. *See generally, Cooter & Gell, supra.* Petitioner has not demonstrated otherwise such that this Court should reverse the lower courts' holdings.

C. Harassment

The District Court also found that Petitioner's claims were asserted for the purpose of harassment. *See*, 23-A – 30-A, Appendix to Petition. This finding was also affirmed by the Eleventh Circuit. *See generally*, 51-A – 62-A, Appendix to Petition. The District Court did not abuse its discretion by imposing sanctions on this theory either. Indeed, Petitioner seeks to further harass Respondents by using this high Court as another forum for his baseless allegations and to relitigate custodial issues.

The District Court held that the malicious prosecution proceedings were initiated and maintained in "an attempt to relitigate the issues involved in the underlying divorce and custody proceedings." 24-A, Appendix to Petition. The District Court took note of five pieces of evidence to support this determination: (1) Ducote's insistence on referring to the 'jury' letter, even after the District Court stated that it would not be taken into consideration by the court (24-A, Appendix); (2) Ducote's argument that the 'jury' letter somehow invalidated the criminal trial judge's denial of directed verdict (24-A – 25-A, Appendix); (3) Ducote's insistence on referencing baseless accusations against Mr. Titelman in regards to sexual misconduct toward his two daughters (25-A – 26-A, Appendix); (4) circumstantial evidence, including an open letter written to members of the Cobb County Bar and the Metro Atlanta Mental Health Professionals as well as Ms. Titelman's subsequent forwarding of that letter to "numerous people" with a statement attached thereto saying "[w]e will continue to fight in both state and federal court" (A-26 – A-28, Appendix); and (5) Ducote's attempt to "insert the limited discovery that took place in the instant litigation into her

ongoing divorce and custody proceedings." (27-A, Appendix)

Petitioner has made no argument that sanctions were impermissible on this basis. As Petitioner has not challenged the District Court's imposition of sanctions on this ground, Respondent Titelman deems it waived. This, alone, is sufficient reason to deny the Petition. Even if not waived, Petitioner has not, and cannot, show that it was an abuse of discretion to impose sanctions upon this basis.

III. NO COMPELLING REASON TO GRANT CERTIORARI

Certiorari should not be granted in this matter as the decisions of both the District Court and Eleventh Circuit were, as shown above, correct. In addition, this Court should not grant Certiorari in this case, as this matter does not present any compelling reason to do so.

Under this Court's Rule 10, petitions for a writ of certiorari "will be granted only for compelling reasons." *Supreme Court Rules*, R. 10. The Rules go on to state three situations in which a 'compelling reason' may be found. *Id.*

A compelling reason may be found where a Court of Appeals or other Court has issued a decision which creates a conflict or 'Circuit split.' *Supreme Court Rules*, R. 10(a). Petitioner has shown no such conflict, as neither the District Court's nor Eleventh Circuit's Opinions have created one.

The two remaining situations in which a compelling reason may be found are also not present here, as no important question of federal law has been stated by this case, nor does this case involve an opinion of a state court

on a question of federal law. *Supreme Court Rules*, R. 10(b) & (c).

Finally, the Rule states that this Court will "rarely" grant certiorari "when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." *Supreme Court Rules*, R. 10. At best, Petitioner's position is essentially that the District Court and/or the Court of Appeals for the Eleventh Circuit misapplied properly stated rules of law and made erroneous findings of fact.

CONCLUSION

For the reasons stated in this Brief in Opposition, Respondent Titelman respectfully requests that this Honorable Court DENY Ducote's Petition for Writ of Certiorari.

Respectfully submitted,

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